No. 523.

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JAMES H. MCKENNEY
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANTS,
v.
JOSEPH C. FINNELL. } No. 523.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANTS.

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STATEMENT OF CASE.

The appellee was clerk of the district and circuit courts of the United States for the district of Kentucky from July 1, 1894, to June 30, 1898. He brought suit in the Court of Claims for the sum of $995 alleged to be due him for attendance on court on one hundred and ninety-nine different days within said period "when the court was opened and adjourned by order of the judge, and while the same was actually in session and business actually transacted." Upon the trial of the case the court, by a majority decision, allowed him the full amount of his said charges and rendered judgment therefor, from which the United States have appealed to this court.

The appellee had his office in the city of Covington, Ky. It was the practice and custom of the judges constituting the courts in said district to transmit orders, decrees, and other proceedings to the clerk at his office by mail. Said judges made the following indorsement thereon: "Enter this order," or "Enter this," or "Enter" (signed by the judge). Upon the receipt of such an order, decree, or other proceeding so indorsed, the appellee entered upon the journal the following: "Court met: Present, Hon. John W. Barr, sitting as circuit judge" (or whoever may have been the judge sending the order). He would then enter on the journal the order, decree or other proceedings received as aforesaid and close with the following: "It is now ordered that court stand adjourned until ———." When another such order indorsed as aforesaid was received the appellee would fill the blank in the foregoing entry of adjournment by inserting the date of the receipt of the succeeding order or decree and make entries opening and adjourning the court until blank date similar to those above indicated. None of the judges of said court were personally present in said city of Covington on any of said days. However, the journal of the court containing said entries was afterwards signed by the respective judges sending the orders, decrees, and other proceedings entered as aforesaid. In this manner the appellee made entries opening and adjourning the court on 199 different days extending through said period. (See finding 2, Record, pp. 3 and 4.)

The appellee made his account for said services as for attendance on court when the same was opened and adjourned by order of the judge and while the same was actually in session and business actually transacted, at $5 per day. Said account was regularly and duly approved by the court but the payment of per diems for said services was refused by the Treasury Department. (See findings 3 and 4, Record, p. 4.)

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the appellants and in favor of the appellee on the findings of fact as set forth in findings 2, 3, and 4. (Record, pp. 3 and 4.)

ARGUMENT.

Section 828, Revised Statutes, paragraph 18, provides that a clerk of the United States courts shall receive "five dollars a day for his attendance on the court while actually in session."

The act of March 3, 1887 (24 Stats. L., 541), provides that "hereafter no part of any appropriation shall be used in payment of * * * a per diem compensation to any attorney, clerk, or marshal for attendance in court, except for days when the court is open[ed] by the judge for business, or business is actually transacted in court, and when they attend under sections five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen of the Revised Statutes, which facts shall be certified in the approval of their accounts."

These sections provide in substance as follows:

583. That in case the judge of the district court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned to the next regular term, or any earlier day, by the marshal, by virtue of a written order directed to him by the judge.

584. That in case the judge of any district court in certain States named, including Kentucky, is not present at the time for opening the court, the clerk may open and adjourn court from day to day for four days, and if the judge does not appear on the fourth day the clerk shall adjourn the court to the next regular term.

671. Provides that in case neither of the judges of the circuit court is present to open any session, the marshal may adjourn the court from day to day until the close of the fourth day, and that if no judge be then present he shall adjourn the court to the next regular term.

672. Provides that if neither of the judges of the circuit court be present to open and adjourn any regular or adjourned special session, either of them may, by a written order directed alternately to the marshal, or, in case of his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before next regular term.

2013. Has been repealed. It had reference to the circuit court's functions in election matters.

It is perfectly apparent that the per diems claimed

in this case do not come under any of the above-named sections, and it is our contention that the services performed by the appellee do not entitle him to a per diem compensation under the first condition named in the act of 1887, to wit, "when the court is opened by the judge for business or business actually transacted in court." The court at Covington could not have been opened by the judge on the days claimed, because there was no judge present. (Finding 2, Rec., p. 3.) No business—that is, no judicial business—was transacted on said days, because none could be in the absence of the judge; there was no court open. It will no doubt be contended on behalf of the appellee that under the act of 1887 the clerk is entitled to a per diem fee when "business is actually transacted in court," whether the same has been opened by the judge for business or not. It will be observed that in the act of March 3, 1887, the word "or" is used in a connection which seemingly makes it provide for per diems when "business is actually transacted in court," as well as when court is "opened by the judge for business;" that is to say, it seemingly implies that business might be transacted in court without the court first having been opened by the judge for business, or that business may be transacted in court in the absence of the judge and without the formality of the court being opened. That such is the intention of the act aforesaid is inconceivable; and even if it was, it would be futile, for courts without judges have not yet been established as a part

of our judicial system. A court can have no existence without a judge, and no business can be "transacted in court" until court be opened by the judge. This is a proposition so elemental that it is unnecessary to support it by argument or the citation of authorities.

What the Congress no doubt intended to provide by the act of March 3, 1887, was that the clerk, along with other officers, should be entitled to per diem compensation for days when court is opened by the judge for business, whether business is actually transacted in court on said days or not, and when said officers attend under sections 583 et seq. In the sundry civil appropriation act of August 4, 1886 (24 Stat. L., 222, 253), Congress provided, among other things, that the clerk should not receive a per diem compensation for attendance in court "except for days when business is actually transacted in court, and when they attend under sections five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen of the Revised Statutes, which fact shall be certified in the approval of their accounts."

This provision limited the per diem compensation of clerks and marshals to "days when business is actually transacted in court" and when they attend under the sections of the statute therein named. Presumably the purpose of making the exception named in said appropriation act, limiting the clerk to per diems for days "when business is actually transacted in court," was to break up the practice of allowing clerks per diems for

attendance on the court when the same was opened by the judge and adjourned to the next or a subsequent day of the term without transacting any business other than opening and adjourning the court. This had been the practice of the accounting officers for nearly forty years, and it had been sanctioned by an unbroken line of decisions of the Court of Claims, the Federal courts, and the Supreme Court. (21 C. Cls. R., p. 1; 23 C. Cls. R., 142; 35 Fed. Rep., 193; 37 Fed. Rep., 470; 58 Fed. Rep., 688; 60 Fed. Rep., 883; 147 U. S., 669.) Thus it is seen the clerks and other officers were for the first time in forty years denied per diem fees for attendance upon court when nothing was done but to open and adjourn the same; and one may readily believe that when Congress next assembled after the passage of this act the attention of the members would be called to this fact. The section of the act of 1886, above referred to, was temporary in its character, and the prohibition of such per diem fees expired by limitation at the end of the fiscal year. Looking at the history of the act of 1887, we are constrained to believe that Congress intended to restore the condition which existed with reference to per diems to clerks and other officers as it was prior to the act of 1886. When the sundry civil act of March 3, 1887, passed the House, the clause limiting the clerks' and other officers' per diems to days when business was actually transacted in court, and when they attend under section 583 and those following, was retained

exactly as it was in the appropriation act of 1886. (Vol. 18, pt. 1, p. 253, Cong. Rec. and House Rep. No. 3477.)

The Senate Committee on Appropriations offered and the Senate adopted the following amendment: "In line 2392, after the word 'when,' insert 'the court is opened for business or' so as to read:

> Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal, for attendance in court except for days when the court is opened for business or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts. (Vol. 18, pt. 2, p. 1229, Cong. Rec.)

Afterwards in conference this section was still further amended by striking out the word "opened" in the foregoing provision and inserting "opened by the judge." (Vol. 18, pt. 3, p. 2606, Cong. Rec.) The conference report was adopted, the bill passed, and in due season signed by the Chief Executive.

There is nothing in the Senate Appropriation Committee's report or the conference committee reports indicating the reasons which moved these respective committees to make the amendments aforesaid, but it is perfectly manifest from the nature of the amendments that they were made for the purpose of changing the condition which then existed under the act of 1886 and insuring to clerks and other officers per diem

fees for attendance on court on days when the court was opened by the judge for business, even though no business was transacted. The clause "or business is actually transacted in court" might very well have been omitted, for the days on which business was transacted in court would necessarily be included with the days on which the court was "opened by the judge for business." This section should be construed as if it read, "nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal for attendance on court except for days when business is actually transacted in court or the court is opened by the judge for business, and when they attend under sections 583 and those following." Giving the statute this construction does not require the elimination of the clause "or business is actually transacted in court." Courts will always endeavor to give power and expression to words and phrases which occur in statutes. It is perhaps true that the meaning which must be given to this statute would have been the same if the words "or business is actually transacted in court" had been entirely omitted; but it is submitted that their presence in the statute does not render it ambiguous or uncertain, and when transposed as above indicated and taken in connection with the purpose which the Congress evidently had in view, they were not improperly used.

Various constructions have been placed upon this section of the act of 1887 by the accounting officers and the Court of Claims. (*Dart case*, 32 C. Cls. R.,

267; *Ackiss*, 31 C. Cls. R., 283; *Converse*, 26 C. Cls. R., 6; 5 Compt. Dec., 403 and 735; 4 Compt. Dec., 161 and 508; Compt. Bowler's Dec., p. 78.)

In view, therefore, of the fact before stated—that no judge of the Federal courts in the State of Kentucky was present at the time and place where the appellee made the entries opening and adjourning the court, as aforesaid—it follows that the court was not opened by the judge for business, nor was any business transacted in court on the days charged within the meaning of the act of March 3, 1887, and, consequently, the allowance of per diem fees for said services was an error.

It may be insisted by the counsel for the appellee that under section 574, Revised Statutes, the court is opened by operation of the law whenever any pleading is filed or any mesne and final process issued or any interlocutory motion or order made and filed therein, so as to entitle him to a per diem fee under section 828, Revised Statutes. Section 574 is as follows:

> The district courts, as courts of admiralty, and as courts of equity, so far as equity jurisdiction has been conferred upon them, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make and direct and

> award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

It is our contention that the act of March 3, 1887, so far as it applies to per diems of clerks and other officers, is supplementary to the eighteenth paragraph of section 828, and further that it is exclusive in its operation. If it had been intended to grant clerks and other officers per diem fees for days on which business was transacted in the court, under section 574, the proper and natural thing would have been to include said section along with the other sections named in the aforesaid act of 1887. The right of a clerk or other United States court officer to compensation for services rendered depends upon the very provisions of the statute. (*Patterson case*, 150 U. S., 65.) The very fact that the Congress omitted section 574 in the enumeration of those sections, for attendance under which the clerk and other officers might receive per diem compensation, leads irresistibly to the conclusion that per diem fees under section 574 are not only not provided for by statute, but are positively prohibited thereby.

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